

Mailed: February 5, 2003

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michael N. Berke

Serial No. 76/261,159

Myron Amer for Michael N. Berke.

Doritt Carroll, Trademark Examining Attorney, Law Office
116 (Meryl Hershkowitz, Managing Attorney).

Before Simms, Hanak and Hairston, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge.

Michael N. Berke (applicant) seeks to register in
typed drawing form ACCU-PRESS for "massage apparatus." The
intent-to-use application was filed on May 29, 2001.

Citing Section 2(d) of the Trademark Act, the
Examining Attorney has refused registration on the basis
that applicant's mark, as applied to massage apparatus, is
likely to cause confusion with the mark ACUPRESS,
previously registered in typed drawing form for "topical
analgesic and counterirritant liquid and applicator
therefor sold as a unit and designed to stimulate body
pressure points." Registration No. 2,035,461.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarity of the marks and the similarity of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the marks, they are absolutely identical in terms of pronunciation and connotation, and they are extremely similar in terms of visual appearance. Thus, the first Dupont "factor weighs heavily against applicant" because applicant's mark is nearly identical to the registered mark. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and registrant's goods, we note that because the marks are nearly identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically

related." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). However, in this case we find that the Examining Attorney has established that applicant's goods and registrant's goods are clearly related.

To elaborate, registrant's goods consist of an applicator which rubs in or pats topical analgesic and counterirritant liquid to stimulate body pressure points. Applicant's goods are very broadly described as "massage apparatus." The word "massage" is defined as "the act or skill of treating the body by rubbing, patting, or the like, as to stimulate circulation or relieve tension." Random House Webster's Dictionary (2001) (emphasis added). Applicant has made of record literature describing its ACCU-PRESS massage apparatus. Applicant's own literature demonstrates that its ACCU-PRESS massage apparatus is "very effective on working the Pressure Points and Muscle Spasms of the spine associated with tension and stress." Thus, both registrant's product and applicant's product are specifically designed to work on body pressure points. Moreover, given the fact that registrant's product includes an applicator that rubs or pats the body, then registrant's applicator falls within that very broad category of goods known as "massage apparatus." Of course, applicant's

identification of goods is that same broad category (i.e. massage apparatus).

In short, given the fact that the marks are nearly identical, and the additional fact that, at an absolute minimum, the goods are extremely closely related, we find that there exists a likelihood of confusion.

One final comment is in order. Without any evidentiary support, applicant speculates that registrant's actual goods may have significant differences from applicant's goods (massage apparatus). Not only is applicant's argument lacking evidentiary support, but in addition, it is legally insufficient. It is well settled that in Board proceedings, "the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the cited] registration, rather than what the evidence shows the goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Applicant's goods are very broadly described as simply "massage apparatus." This extremely broad description of goods would encompass registrant's applicator for applying topical analgesic and counterirritant liquid to stimulate body pressure points.

Even assuming for the sake of argument that the term "massage apparatus" did not encompass registrant's applicator, nevertheless, at an absolute minimum, registrant's and applicant's goods are extremely closely related.

Decision: The refusal to register is affirmed.